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BALA SUBRAMANIYAM MOOKAPILLAI & ANOR v. TETUAN RAJ SELVA & CO

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[PETITION NO: AA-17D-02-12-2017]
10 MARCH 2020

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LEGAL PROFESSION: *Bill of costs – Taxation – Appeal to set aside decision of Senior Assistant Registrar ('SAR') in awarding RM400,000 as fees after taxing – Whether decision based on correct principles – Whether amount reasonable considering complexity of matter and issues – Whether legal counsel represented party for number of years and laid basis for eventual success of case – Whether quantum of RM400,000 as 'getting up' fees justified – Whether decision of SAR affirmed*

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LIMITATION: *Cause of action – Accrual of – Whether claim for legal fees time-barred by limitation – Whether bill of costs delivered beyond six years from date of cause of action – Whether clearly out of time – Whether time began to run when party petitioned for bill of costs to be taxed – Limitation Act 1953, ss. 6 & 26(2)*

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This was an appeal by the appellants to set aside the decision of the Senior Assistant Registrar ('SAR') in awarding RM400,000 as fees to the respondent after taxing of the bill of costs ('BOC'). The appellants were the personal representatives of the estate of Ponnamal Mookapillai ('Ponnamal') who passed away in 1988. Sometime in 1980, Ponnamal entered into an agreement with one Nadarajah Sithambaram Pillai ('Nadarajah') to buy a piece of land at the purchase price of RM3,000,000. Nadarajah passed away sometime in August of 1982 after receiving RM420,000 as deposit under the agreement. A dispute arose between Ponnamal and Nadarajah's estate in respect of the transfer of the land to Ponnamal. The respondent was engaged by Ponnamal to commence originating summons against Nadarajah's estate seeking specific performance of the agreement. Whilst undertaking the proceedings, the respondent succeeded in securing a judgment by way of a consent order for specific performance. The respondent represented Ponnamal and subsequently after her death, the estate of Ponnamal. Subsequently, specific performance was ordered in respect of the sale and purchase of the land against Nadarajah's estate. Nadarajah's estate appealed against the High Court decision to the Court of Appeal. At the Court of Appeal, the estate of Ponnamal was partly represented by the respondent. The Court of Appeal dismissed the appeal of Nadarajah's estate. Dissatisfied, Nadarajah's estate appealed to the Federal Court. At the Federal Court, the estate of Ponnamal was no longer represented by the respondent. The Federal

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Court dismissed Nadarajah's estate's appeal and ordered that the appellants pay the balance of the purchase price to Nadarajah's estate which the appellants complied with. It was after the decision of the Federal Court that a dispute arose with regards to the question of fees to be paid to the respondent. The respondent issued a BOC in accordance with the relevant provisions of the Legal Profession Act 1976 ('LPA'). The amount stated in the BOC was RM4,855,000. The petitioner asserted that the amount claimed was unacceptable and wholly disproportionate to the work carried out by the respondent as the appellant had already paid the respondent RM74,000 in fees. The appellants prayed that the BOC be referred to the SAR to be taxed under s. 126 of the LPA. The appellants contended that the correct and reasonable amount payable to the respondent would be RM349,300. The SAR awarded the sum of RM400,000 as getting up costs and RM2,785 as out of pocket expenses. Both the appellants and the respondent appealed against the decision of the SAR. In the course of submissions, the appellants raised a preliminary objection that the respondent's claim for fees was time-barred by limitation. The appellants argued that the appellants had discharged the respondent on 31 December 2008 and the respondent only delivered the BOC on 17 June 2015. According to the appellant, the BOC was delivered by the respondent beyond the six years from the date of the cause of action, and hence, the respondent was clearly out of time on the basis that the respondent's claim was time-barred under s. 6 of the Limitation Act 1953 ('Limitation Act'). The appellants also submitted that the decision of the SAR to the quantum of RM400,000 as 'getting up' fees was unjustified.

Held (dismissing appeal; affirming decision of SAR):

(1) The argument regarding limitation put forth by the appellants must fail as they themselves had filed in encl. 1, wherein in the affidavit in support of the application for the BOC to be taxed, the appellants had unequivocally acknowledged the debt to the respondent. The appellants had acknowledged that they owed the respondent legal fees but that they did not agree to the amount as stated in the BOC. The appellants found the amount claimed as exorbitant hence their application for the BOC to be taxed. In other words, the appellants agreed that there were payments of some professional fees still pending. This acknowledgment amounted to a fresh accrual of action of which limitation would run from that date. In this respect, s. 26(2) of the Limitation Act would be relevant. In the present case, the time in respect of s. 6 of the Limitation Act began to run when the appellants petitioned for the BOC to be taxed, which was 8 December 2017. (paras 18, 19 & 21)

(2) There was nothing to suggest that the SAR had based his decision on the wrong principles in awarding the sum of RM400,000 as 'getting up' fees. This sum was a reasonable amount taking into consideration the following factors (i) the complexity of the matter where issues such as the setting aside of a consent order and the principles in relation to specific performance considering the principles of equity were deliberated upon; (ii) the complexity of the issues concerning this case was reflected in the judgments of the Federal Court and the Court of Appeal; (iii) even if the respondent had ceased acting for the estate of Ponnamal by the time the matter went up to the Federal Court, the time frame when the respondent was on record spanned from when the originating summons was first filed in 1984 to when the matter was disposed of in 2010. This would add up to 26 years in representing and defending Ponnamal and the estate of Ponnamal; and (iv) the value of the property which had been the source of dispute was also a relevant consideration. It was through the respondent's skill and expertise in ensuring that the land stayed with Ponnamal's estate that the estate had benefited through the increase in value as well as revenue from the land. One also could not ignore the fact that the respondent had laid the basis for the eventual success of the case at the Federal Court. (paras 23 & 24)

Case(s) referred to:

Abbas & Ngan lwn. Affin Bank Bhd [2010] 1 LNS 1082 HC ***(refd)***

Coburn v. Colledge [1897] 1 QB 702 ***(refd)***

Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Ors [2014] 5 CLJ 512 HC ***(refd)***

Lim Kien Seng & Anor v. Tetuan K Mano & Associates [2019] 7 CLJ 457 CA ***(refd)***

Pang Kok v. Leong Fock Hap & Anor [1997] 1 CLJ Supp 232 HC ***(refd)***

Poraviappan Arunasalam Pillay v. Periasamy Sithambaram Pillai & Ors [2011] 1 LNS 1744 CA ***(refd)***

Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2015] 6 CLJ 857 FC ***(refd)***

Southern Finance Co Bhd v. Zamrud Properties Sdn Bhd (No 3) [1999] 4 CLJ 754 HC ***(refd)***

Yong Teck Lee v. Harris Mohd Salleh & Anor [2010] 1 CLJ 156 FC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, s. 126

Limitation Act 1953, ss. 6, 26(2)

For the appellants - Gavin Jayapal; M/s Gavin Jayapal

For the respondent - Nasema Jalaludheen & Samanthan Su Xiu Ming; M/s Cheah Teh & Su

Reported by Suhainah Wahiduddin

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] This is an appeal by the appellants to set aside the decision of the learned Senior Assistant Registrar ("SAR") in awarding RM400,000 as fees to the respondent after taxing of the bill of cost ("BOC").

Background

[2] The amount stated in the BOC dated 5 June 2017 was RM4,855,000. The petitioner asserted that the amount claimed was "grotesque, capricious, unacceptable and wholly disproportionate to the work carried out by the respondent" as the appellant had already paid the respondent RM74,000 in fees. The appellants prayed that the BOC be referred to the SAR to be taxed under s. 126 of the Legal Profession Act 1976. The appellants contend that the correct and reasonable amount payable to the respondent would be RM349,300.

[3] On 20 September 2018 this court allowed the appellants' application for the BOC be taxed by the SAR. For ease of reference the relevant part of s. 126 is reproduced here:

> (1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.
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> (2) The order shall contain such directions and conditions as the court thinks proper, and any party aggrieved by any order of Court may apply by summons in chambers that the same may be amended or varied or set aside.

[4] On 18 March 2019, the learned SAR awarded the sum of RM400,000 as getting up cost and RM2,785 as out of pocket expense. The costs awarded was subject to a 4% allocator fee.

[5] Both the appellants and the respondent appealed against the decision of the SAR (see encl. 60 and encl. 61 respectively).

[6] The appeals were heard before this court on 27 June 2019. Both appeals were dismissed and this court affirmed the decision of the learned SAR. Not being satisfied with the decision of this court appellants appealed to the Court of Appeal.

A **Brief History**

[7] In order to show how this present proceeding came about I will start by giving a brief history of this case.

[8] The appellants held themselves out as the personal representatives of
B the estate of Ponnamal a/p Mookapillai ("Ponnamal"). They also claim to be the trustees of the will of Ponnamal. Ponnamal passed away on 25 November 1988.

[9] Sometime in 1980, Ponnamal entered into an agreement with one Nadarajah a/l Sithambaram Pillai ("Nadarajah") to buy a piece of land held
C under Grant No. 12359 Lot 1631 Mukim Teluk Bharu in the State of Perak ("the land"). The purchase price was RM3,000,000. Nadarajah passed away sometime in August of 1982 after receiving RM420,000 as deposit under the agreement.

[10] A dispute arose between Ponnamal and Nadarajah's estate in respect
D of the transfer of the land to Ponnamal. The respondent was engaged by Ponnamal in 1984 to commence Originating Summons 267 of 1984 ("OS 267") against Nadarajah's estate seeking specific performance of the agreement. Whilst undertaking the proceedings, the respondent had succeeded in securing a judgment by way of a consent order dated 31 October
E 1985 for specific performance.

[11] Nadarajah's estate then commenced a separate suit at the Ipoh High Court, namely Civil Suit 2087 ("CS2087") praying, *inter alia* to set aside the consent order and a declaration that the agreement was void and unenforceable as it was an illegal moneylending transaction. The two matters
F were consolidated and were heard together. The respondent represented Ponnamal and subsequently after her death the estate of Ponnamal in both these matters.

[12] On 18 January 2002, James Foong J (as he then was) ordered specific performance in respect of sale and purchase of the land against Nadarajah's
G estate. Nadarajah's estate appealed against the High Court decision to the Court of Appeal. At the Court of Appeal, the estate of Ponnamal was partly represented by the respondent. The estate of Ponnamal had by this time also appointed another lawyer namely Benard Francis to represent them in the Court of Appeal. The Court of Appeal had dismissed the appeal of
H Nadarajah's estate on 5 March 2010.

[13] Not being satisfied with the decision of the Court of Appeal Nadarajah's estate appealed to the Federal Court. At the Federal Court the estate of Ponnamal was no longer represented by the respondent. On the 17 June 2015 the Federal Court dismissed Nadarajah's estate's appeal and
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ordered that the appellants pay the balance of the purchase price to Nadarajah's estate within two weeks of the Federal Court's order which the appellants complied with. The judgment of the Federal Court is reported as *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor* [2015] 6 CLJ 857.

[14] It was after the decision of the Federal Court that a dispute arose with regards to the question of fees to be paid to the respondent. The respondent had issued a BOC dated 5 June 2017 in accordance with the relevant provisions of the Legal Profession Act 1976. The BOC was served on the appellants on 17 June 2017. On 8 December 2017 the appellants applied for the BOC to be taxed in accordance with s. 126 of the Legal Profession Act 1976.

Issues Raised

[15] In the course of submissions, I find that two issues had been raised by the appellants. The first issue concerns a preliminary objection on the question of limitation. The second issue was with regards to the decision of the SAR to the quantum RM400,000 as "getting up" fees which the appellants felt it was unjustified.

[16] The preliminary objection raised by counsel for the appellant was that the respondent's claim for fees was time-barred by limitation. Learned counsel argued that the appellants had discharged the respondent on 31 December 2008. The respondent only delivered the BOC on 17 June 2015. According to counsel the BOC was delivered by the respondent beyond the six years from the date of the cause of action. It was argued that the respondent was clearly out of time on the basis that the respondent's claim for his fees is time-barred under s. 6 of the Limitation Act 1953. Section 6 of the Limitation Act 1953 states:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
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> (b) ...
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> (c) ...
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> (d) ...
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> (2) An action for an account shall not be brought in respect of any matter which arose **more than six years before the commencement of the action.** (emphasis added)

[17] In his objection counsel cited the case of *Abbas & Ngan lwn. Affin Bank Bhd* [2010] 1 LNS 1082 to support his contention. In *Abbas & Ngan (supra)* the learned High Court Judge followed the English case of *Coburn v. Colledge* [1897] 1 QB 702 and held that the limitation period began to run "the moment that the work which the plaintiff was retained to do was completed". In this case, the appellants were of the view that the respondent's work was completed on 31 December 2008 when the appellants had discharged them.

[18] To my mind the argument regarding limitation as put forth by the appellants must fail as they themselves had filed in encl. 1 wherein in the affidavit in support of the application for the BOC to be taxed, the appellants in doing so had unequivocally acknowledged the debt to the respondent by stating at paras. 17 and 18 of encl. 2 the following:

> 17. Di bawah item "Getting Up" (A), Responden telah menunjukkan jumlah sebanyak RM4,855,000.00. Saya menyatakan jum/ah tersebut RM4,855,000.00 adalah sangat grotesque, capricious, unacceptable and wholly disproportionate yang tidak sesuai dengan kerja yang dilakukan oleh Responden. *Saya menyatakan bahawa jumlah yang munasabah adalah RM349,300.00 sebagaimana yang dipersetujui oleh Responden itu sendiri seperti yang dijelaskan dalam perenggan 15 di atas.* (emphasis added)
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> 18. Saya dinasihatkan bahawa Bil Kos Responden harus dikenakan cukai. Saya menyatakan bahawa kami akan menyatakan pada masa penetapan kos (taxation) bahawa Bil Kos yang betul yang harus dibayar kepada Responden adalah RM 349,300.00.
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> (emphasis added)

[19] From the plain reading of paras. 17 and 18 of the appellants' affidavit dated 5 June 2017, the appellants had acknowledged that they owed the respondent legal fees but that they do not agree to the amount as stated in the BOC. The appellants found the amount claimed as exorbitant hence their application for the BOC to be taxed. In other words, the appellants agree that there were payments of some professional fees still pending. This acknowledgment would amount to a fresh accrual of action of which limitation would run from that date. In this respect s. 26(2) of the Limitation Act 1953 would be relevant. The applicable part of the section states:

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore **acknowledges the claim** or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.
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> (emphasis added)

[20] Of relevance on this point is the recent Court of Appeal case of *Lim Kien Seng & Anor v. Tetuan K Mano & Associates* [2019] 7 CLJ 457 where Mary Lim JCA in delivering the judgment of the Court of Appeal stated:

> [28] It was further argued by the respondent that time bar cannot operate in view of s. 26 of the Limitation Act 1953, relying on the decision of the English Court of Appeal in *Phillips & Co v. Bath Housing Co-Op Ltd* [2013] 2 All ER 475 in this regard. *In this case, the solicitor sent his bills to his client who responded with shock at the amount charged the solicitor, exclaiming that the amount was much higher than was anticipated or budgeted for.* The Court of Appeal held that a solicitor's claim for his fees was a debt that was not quantified until agreement by the client, assessment through taxation or subject matter of a judgment, that the letter questioning the amount or quantum was actually an acknowledgement of the existence of a debt that prevented time bar from setting in.
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> [29] Given that the OS was filed at the behest of the appellants [the appellants had asked the respondent to have his bills taxed, amounting to an acknowledgment of the debt], it is arguable that the OS is not time barred by reason of this acknowledgment. *Time, for the purpose of the Limitation Act 1953, runs only from the date when the appellants asked for detailed bill of costs to be taxed, that is, on 2 April 2012.* Under such circumstances and for this added reason, the OS is not time barred. (emphasis added)

[21] As in the case of *Lim Kien Seng & Anor* (*supra)*, I am of the view that, in the present case, the time in respect of s. 6 of the Limitation Act 1953 began to run when the appellants petitioned for the BOC to be taxed, that is on 8 December 2017.

[22] As regards to the quantum, it is trite that:

(i) the court will not interfere with the decision of the taxing officer unless the taxing officer has exercised his or her decision based on wrong principles or when the taxing officer has disregarded material matters or had taken into account irrelevant matters (see *Yong Teck Lee v. Harris Mohd Salleh & Anor* [2010] 1 CLJ 156; [2009] 6 MLJ 437; and *Pang Kok v. Leong Fock Hap & Anor* [1997] 1 CLJ Supp 232; [1997] 1 BLJ 232).

(ii) a solicitor was entitled to all the "getting up" costs necessary for the preparation of the case and not just the issues relied on by the court in arriving at the decision (See *Southern Finance Co Bhd v. Zamrud Properties Sdn Bhd (No 3)* [1999] 4 CLJ 754).

[23] There is nothing to suggest the learned SAR had based his decision on the wrong principles in awarding the sum of RM400,000 as "getting up" fees. I find that this sum is a reasonable amount taking into consideration the following factors:

(i) The complexity of the matter where issues such as the setting aside of a consent order, the validity of the sale and purchase agreement between Ponnamal and Nadarajah which was alleged to be an illegal moneylending transaction and the principles in relation to specific performance considering the principles of equity were deliberated upon.

(ii) The complexity of the issues concerning this case is reflected in the judgments of the Federal Court in *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai*) *(supra)* and the Court of Appeal reported as *Poraviappan Arunasalam Pillay v. Periasamy Sithambaram Pillai & Ors* [2011] 1 LNS 1744 CA.

(iii) Even if the respondent had ceased acting for the estate of Ponnamal by the time the matter went up to the Federal Court as contended by the appellants, the time frame when the respondent was on record spans from when the OS 267 was first filed sometime in 1984 to when the matter was disposed of by the Court of Appeal in 2010. This would add up to 26 years in representing and defending Ponnamal and the estate of Ponnamal. The length of time for the case to be disposed of or the period when the respondent was on record is a relevant factor to be considered (See *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Ors* [2014] 5 CLJ 512).

(iv) The value of the property which had been the source of dispute is also a relevant consideration. The land was purchased for RM3,000,000 in 1980. The value had increased to RM21,000,000 as at 31 December 2015. (See encl. 8, exh. RS1, p. 25)

[24] It would not be out of place here to state that it was through the respondent's skill and expertise in ensuring that the land stayed with Ponnamal's estate that the estate had benefited through the increase in value as well as revenue from the land. One also cannot ignore the fact that the respondent had laid the basis for the eventual success of the case at the Federal Court.

Conclusion

[25] In the upshot, I dismiss this appeal and affirm the decision of the learned SAR.